Supreme Court, U. S.
FILED
JUL 14 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

BRIEF ON BEHALF OF MADISON TEACHERS INCORPORATED, APPELLEE

Robert C. Kelly

William Haus

KELLY and HAUS
302 East Washington Avenue
Madison, Wisconsin 53703

Attorneys for Appellees,
MADISON TEACHERS INCORPORATED

INDEX

Page

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. This Case Presents The Question Of Whether A Bargaining Unit Member Representing A Dissident Minority Within A Public Employer Bargaining Unit Is Constitutionally Entitled To Collectively Bargain And/Or Negotiate With Said Employer On Behalf Of Said Dissident Minority. 12

A. Albert Holmquist addressed the Board of Education as a representative and collective bargaining agent for a dissident minority in the bargaining unit and not in the capacity as an individual citizen. 13

B. The Board of Education's role and obligations as a public employer cannot be circumvented under the guise of a public meeting. 20

Page

C. Fair-share is a mandatory subject of bargaining that was in fact a subject of intense bargaining throughout 1971..... 24

II. The Concept Of Exclusivity Lies At The Core Of The Majority Rule Principle In Labor-Management Relations And Has Been Endorsed By This Court As Well As The Laws Of The State Of Wisconsin As An Essential Component Of Effective Collective Bargaining..... 26

A. Wisconsin law endorses the fundamental principles of majority rule and exclusivity..... 27

B. Federal law endorses the fundamental principles of majority rule and exclusivity..... 30

C. Denying a representative of a minority of the bargaining unit employees the right to appear at a public meeting of the Board of Education and to negotiate with the Board on mandatory subjects of

Page

bargaining does not infringe upon the right of freedom of expression or the right to petition one's government, as guaranteed by the Wisconsin and United States Constitution. 37

III. The Public Policy Considerations Which Have Resulted In The Majority Rule Principle And The Exclusivity Doctrine In Labor Management Relations Law Is At Least As Sound For The Public Sector As It Is For The Private Sector...... 43

CONCLUSION 47

TABLE OF CITATIONS

CASES CITED

Alberto Culver Co. (1962),
136 NLRB 1432, 50 LRRM 1026 25

American Printing Co. and International Pressmen Association Union (1968),
173 NLRB 17, 69 LRRM 1238 41

Bell Bakeries (1952),
97 NLRB 1423, 29 LRRM 1254 23

Page

Bishop and Malco, Inc. (1966),
159 NLRB 1159, 62 LRRM 1498 23

Board of School Directors v. WERC (1969),
42 Wis. (2d) 637, 168 N.W. (2d) 92 14,27,29

Broadrick v. Oklahoma (1973),
413 U.S. 601, 93 S.Ct. 2908,
37 L.Ed. (2d) 830 31

Bryan Bros. Packing Corp (1968),
171 NLRB No. 39, 63 LRRM 1008 23

Cherokee Sportswear, Inc. (1969),
172 NLRB No. 40, 72 LRRM 1059 23

Coast Radio Broadcasting Corp. (1965),
151 NLRB 117, 58 LRRM 1574 41

Emporium Capwell Co. v. Western
Addition Community Organization (1975),
420 U.S. 50 33,35,36

Fisher v. Walker (10th Cir. 1972),
464 F. (2d) 1147 31

Ford Motor Co. v. Huffman (1953),
345 U.S. 330 35

J. I. Case Co. v. NLRB (1944),
321 U.S. 332 34

Page

Joint School Dist. No. 8,
City of Madison v.
Wis. E.R. Board (1967),
37 Wis. (2d) 483, 486, 155 N.W. (2d) 78 28

LaCrosse County Institution Employees v.
WERC (1971),
52 Wis. (2d) 295, 190 N.W. (2d) 204 30

Lawn Boy Division Outboard
Marine Corporation (1963),
143 NLRB 535, 53 LRRM 1342 42

MFA Milling Co. (1968),
170 NLRB 111, 68 LRRM 1077 25

Magnavox v. NLRB (1974),
415 U.S. 322 39

Medo Photo Supply Corp. v. NLRB (1944),
321 U.S. 678, 64 S.Ct. 930,
14 LRRM 581 32

Milwaukee County Dist. Council, etc., v.
Wis. E. R. Board (1964),
23 Wis. (2d) 303 28

NLRB v. Allis-Chalmers Mfg. Co. (1967),
388 U.S. 175, 180, 87 S.Ct. 2001,
18 L.Ed. (2d) 1123 31,35

NLRB v. Andrew Jergens Co. (CA 9 1949),
24:2096, enforcing 21, 1192 (24:2561)
Cert denied 33 LRRM 2133 25

NLRB v. Jones & Laughlin Steel Corp. (1937),
301 U.S. 1 34

Page

Paulos v. Breier (E.D. Wis. 1974),
371 F. Supp. 523 31

Pickering v. The Board of Education (1968),
391 U.S. 563, 88 S.Ct. 1731,
20 L.Ed. (2d) 811 17,18,19,30

Steel v. Louisville & N.R. Co.,
323 U.S. 192 36

Tabasco Prestressed Concrete Company (1969),
177 NLRB 101, 71 LRRM 1565 41

U.S. Civil Service Com'n. v.
Letter Carriers (1973),
413 U.S. 548, 93 S.Ct. 2880,
37 L.Ed. (2d) 796 31

Vaca v. Sipes (1967),
386 U.S. 171 34

Western Addition Community Org. v.
NLRB (CA DC 1973),
485 F. (2d) 917 32

West Virginia State Board of Education v.
Barnette (1943),
319 U.S. 624; 63 S.Ct. 1178 30

White Sulphur Springs Co. v. NLRB (1962),
136 NLRB 375,
49 LRRM 1778 enforced as modified,
316 F. (2d) 410, CADC (1963),
52 LRRM 2608 41

Page

STATUTES INVOLVED

United States Statutes

29 U.S.C.

Section 151 34

Section 157 34

Section 158 (a) (3) 34

Wisconsin Statutes

Laws of 1971

Chapter 124 2

Section 111.70 (1) (h) 24

Section 111.70 (2) 24

Section 111.70 (3) (a) 1 and 4 45,48

TEXTS

H.R. Rep. No. 972,
74th Cong., 1st Sess.,
18 II Leg. Hist. of
the NLRA 2974 (1935) 35

H.R. Rep. No. 1147 on S. 1958,
74th Cong., 1st Sess. at 20 31

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT No. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT No. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

BRIEF ON BEHALF OF MADISON TEACHERS INCORPORATED, APPELLEE

QUESTION PRESENTED

Whether a state, in furtherance of its public sector labor policy of recognizing the principal of exclusive representation, may prohibit a school board from engaging in negotiations and interfering with and restraining bargaining unit employees in their right to bargain collectively through representatives of their own choosing on mandatory subjects of bargaining, then under negotiation, at a public meeting of said school board.

STATEMENT OF THE CASE

The Appellee, Madison Teachers Incorporated (hereinafter MTI) agrees with the Appellant's statement of the case except insofar as the following corrects or adds to Appellant's statement.

Legislation providing for fair-share agreements became effective on November 11, 1971 by Chapter 124, Laws of 1971. On November 17 MTI submitted its third fair-share proposal to conform with the new laws (A.P. 14) By this time, however, thirteen unresolved issues crowded the bargaining table. Two of them loomed large: (1) fair-share, and (2) final and binding arbitration of teacher dismissals and nonrenewals. The Board of Education (hereinafter Board) had opposed both arbitration and fair-share throughout negotiations. The parties were at impasse concerning negotiations for the 1972 collective bargaining agreement. (A.P. 61) On the other hand, one of the Board's bargaining representatives indicated, informally, that (a) fair-share possibly might be accepted by the Board although arbitration of dismissals and nonrenewals could not possibly be accepted; (A.P. 69) and (b) two members of the Board would approve fair-share if the union withdrew its arbitration proposal. (A.P. 49)

On November 14, 1971, Albert Holmquist and Ralph K. Reed, both of whom are teacher employee bargaining unit members, and both of whom are not members of MTI, sent a letter to all teacher

bargaining unit personnel addressed to "Dear Fellow Madison Educator." (A.P. 83, 135-136) Said letter, headed "EC-OLOGY" — meaning "Educator's Choice — Obligatory Leadership or Goverance by You" asked the addressee to "save freedom of choice" and stated that "a closed shop (agency shop) removes the freedom." The bottom portion of the letter was in the form of a ballot allowing the addressee to express his opposition to "Agency Shop." The letter solicited responses, and two hundred were received, the majority of which were favorable to the Holmquist-Reed position on fair-share. (A.P. 83)

Thereafter, Holmquist and Reed called a meeting of those teachers who had indicated they would work actively against any fair-share agreement. (A.P. 83) Said meeting, held on December 2, 1971, was attended by fourteen teachers, seven of whom were MTI members and seven of whom were not. (A.P. 83)

As a result of the meeting of the fourteen teachers, a letter of transmittal (A. P. 136-138), a memorandum entitled "Points of Information" (A. P. 138-139) and a petition (A. P. 140) were drawn up. Printed copies of all such documents were distributed to the teachers employed by the School District on December 3, 4, and 5, 1971. (A. P. 84-86)

A regular meeting of the Board of Education was scheduled to be held during the evening of December 6, 1971. (A. P. 14) In the mid-afternoon of

December 6, 1971, John Matthews, Executive Director of MTI, learned that Holmquist intended to address the Board of Education at its scheduled meeting on the matter of fair-share. (A. P. 15-16)

Prior to such Board meeting, on the same day, Mr. Matthews and Mr. Joe Mason, a teacher employed by the Board, met with Mr. Keith Yelinek, a member of the Board of Education, in the parking lot of the Administration Building (where the Board meeting was to be held). (A. P. 16) Matthews and Mason advised Yelinek of Holmquist's intentions of addressing the Board of Education that evening in regard to fair-share. Furthermore, Matthews presented Yelinek with copies of the Wisconsin Employment Relations Commission (hereinafter WERC) and Circuit Court decisions regarding *Board of School Directors v. WERC*, (1969), 42 Wis. 2d 637, 168 N.W. 2d 92, with highlighted portions which establish a prohibition in Wisconsin against a minority union representative negotiating with a public employer "under the guise of a public meeting." (A.P. 17) When Matthews inquired whether MTI should bring this matter to the attention of the Board, Yelinek said he (Yelinek) "would take care of it." (A.P. 17)

Still only minutes before the December 6 Board meeting, Matthews met with Holmquist and Reed. He apprised them of the same circuit court decision. (A. P. 43) Matthews urged Holmquist and Reed not to make a presentation against fair-share "or we were going to lose the whole ballgame." (A. P. 50)

Nevertheless, at the portion of the meeting called "Public Appearances" Holmquist rose to speak. He had concluded that people were confused as to the meaning of fair-share. His aim was to defeat fair-share this time around. (A. P. 109) He said to the Board: [(A.P. 22, 69, 99); see Commission's Finding of Fact #12 (A.P. 130)]

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am another teacher. I represent an informal committee of 72 teachers in 49 schools. I would like to inform the Madison Board of Education, as I already have the Madison Teachers Incorporated, about the results of an informational survey regarding one of the thirteen or so items now on the conference table and one of the main items that will certainly be included in some form in the new package."

Holmquist then read to the Board the text of a petition he had circulated among bargaining unit teachers dated December 6, 1971 which read as follows:

> "To: Madison Board of Education
> Madison Teachers, Incorporated
>
> We the undersigned ask that the fair-share proposal (agency shop) being negotiated by Madison Teachers, Incorporated and the Madison Board of Education be deferred this year. We propose the following:
>
> 1) The Fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups.

2) The findings of this study be made public.

3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair-share proposal.

4) The results of this written ballot be made public." (See A. P. 100)

Holmquist then added:

"We feel this study necessary because neither the board's negotiators who have placed entirely too much emphasis on this one point nor Madison Teachers, Inc. which speaks euphemistically about the 'whole package' and therefore is not issue specific... Neither has properly addressed the serious issue of fair-share and agency shop. We find much confusion in the proposal as it stands and even more on the part of teachers' interpretations of it. For evidence, 417 teachers from the 31 schools which represents 53% of the total number of these faculties of these schools ... who have called in to this hour have signed the petition on the first day it was taken into their schools. Due to this confusion, we wish to take no stand on the proposal itself, but ask only that all alternatives be presented clearly to all teachers and more importantly to the general public to whom we are all responsible. We ask simply for communication, not confrontation." (A. P. 100)

School board president, Mrs. Doyle, asked whether Holmquist intended to communicate the petitions to the board, and Holmquist responded affirmatively. (A. P. 101)

MTI feared Holmquist's action was:

" * * * the most damaging thing to our strategy that had occurred in the last two years. ***(I)t undermined the strategy we were attempting. It hurt us drastically" (A. P. 70)

The Board repaired to executive session. It passed a resolution which said:

"It was moved and seconded to accept the total package as presented including arbitration for dismissal of non-probationary teachers and *not* including agency shop: if the MTI does not accept this as a total package the offer of arbitration is withdrawn." (Emphasis the Board's.) (A. P. 23-24)

Negotiations resumed the next day. The Board had a new team. Superintendent Ritchie opened the meeting by presenting the above-quoted board resolution and saying "This is the deal." (A.P. 24) MTI conceded.

"We decided *** that was the best we were going to get in view of the motion that was passed by the board the night before." (A.P. 52)

MTI filed a complaint with the Wisconsin Employment Relations Commission on January 6, 1972, alleging that the Board had committed prohibited practice in violation of sec. 111.70 (3) (a) 1. and 4., Stats. The complaint sought the issuance of an order by the WERC requiring the school board to:

1. Cease and desist from:

a) negotiating now and in the future as concerns questions of wages, hours and conditions of employment with individual employees or groups of employees.

b) interfering with and restraining its bargaining unit employees in their right to bargain collectively through representatives of their own choosing.

2. Take the following affirmative action to effectuate the policies of Section 111.70, Wis. Stats.

a) Expunge from the official minutes of the December 6, 1971 meeting of the Board of Education, any and all reference to the remarks of Albert M. Holmquist.

b) Expunge from the official minutes and records of the School District any reference to any written petitions, including such written petitions themselves received by the Board from Albert M. Holmquist on December 6, 1971. (A.P. 6)

On September 13, 1972, the WERC concluded that the Board of Education had committed a prohibited practice and issued an order that the Board:

"Shall immediately cease and desist from permitting employees, other than

representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining between it and Madison Teachers Inc."

SUMMARY OF ARGUMENT

I

This case essentially involves a labor relations problem set in the context of public employment. More particularly, the issue presented for resolution is whether a bargaining unit member representing a dissident minority within a public employer bargaining unit is constitutionally entitled to collectively bargain and/or negotiate with the employer on behalf of said dissident minority, especially as to a matter that is a mandatory subject of bargaining.

A. All the facts and circumstances herein unequivocably indicate that Albert Holmquist addressed the Board of Education as a representative and collective bargaining agent for a dissident minority (ECOLOGY) in the bargaining unit and not as an individual citizen. As an individual acting in the capacity of a representative of a dissident minority, any actions or communications made in the context of collective bargaining must meet the standards of propriety established under the labor relations laws and are not of the same high constitutional status as communications

made by individual citizens acting in their civic role. The First and Fourteenth amendments therefore are not applicable to the facts herein.

B. The Board of Education, through its agents and directly, aided and abetted the dissident minority (ECOLOGY) in effectively promoting a minority position on a mandatory subject of bargaining. Since fair-share is a mandatory subject of bargaining and any resolution of the fair-share issue must be accomplished through the collective bargaining process by the appropriate bargaining representatives, the Board of Education, by allowing itself to be influenced by a minority representative (an inappropriate bargaining agent) and by directly aiding said minority representative, interfered with the rights of its bargaining unit employees to collectively bargain through MTI as the representative of their own choosing. The Board did this with full advance knowledge of what Mr. Holmquist intended to do and in what capacity he was acting. The Board cannot avoid regulation of its conduct as a public employer merely by shifting some component(s) of its collective bargaining activities to a public forum.

C. Fair-share is a mandatory subject of bargaining that was in fact a subject of intense bargaining throughout 1971.

II.

A. and B. The majority rule principle and its corollary, the exclusivity doctrine, have been endorsed in Wisconsin and at the federal level and approved in the Courts at all levels. Majority rule and exclusivity are viewed as pivotal to a viable collective bargaining structure. The First and Fourteenth Amendment have not been viewed by this Court as a bar to the majority rule and exclusivity principles.

C. Denying a representative of a minority of the bargaining unit employees the right to address the employer on matters subject to collective bargaining does not infringe on Constitutional freedoms. The State has a vital interest in regulating employment relations in the private sector and, perhaps more importantly, in the public sector which is not precluded by Constitutional prohibitions.

III.

Public policy considerations demand that there be a peaceful and systematic procedure for the conduct of employment relations in the public sector. Experience has found collective bargaining to best fulfill that need. Labor peace is as, if not more, crucial in the public sector than in the private sector. Public employees would certainly be

second class citizens if they were not permitted some means of *effective* participation in ordering their labor relations through collective bargaining mechanisms. If the State sees fit to administer public sector labor relations through the collective bargaining mechanism, there is no Constitutional barrier to its so doing.

ARGUMENT

I. This Case Presents The Question Of Whether A Bargaining Unit Member Representing A Dissident Minority Within A Public Employer Bargaining Unit Is Constitutionally Entitled To Collectively Bargain and/Or Negotiate With Said Employer On Behalf Of Said Dissident Minority.

The ultimate question presented for adjudication in the case at bar is whether the conduct complained of by the Appellee (MTI) in its original complaint is violative of Section 111.70 Wis. Stats. by its incursion on, interference with, and derogation of the collective bargaining functions of the exclusive bargaining agent. MTI poses no challenge or argument against the unique prominence and vigilent defense accorded First Amendment and Fourteenth Amendment rights in

our Constitutional system. The posture of uncompromising deference accorded the fundamental Constitutional rights by this Court in its decisions is an integral component of the fortress of liberty that our nation has built. MTI would play no role in urging its dismantling.

The case at bar is essentially a problem of labor relations set in the context of public employment. Any attack on the order issued by the Wisconsin Employment Relations Commission should not divert attention from the essential facts that give rise to the case itself and its proper adjudication on the merits.

A. *Albert Holmquist addressed the Board of Education as a representative and collective bargaining agent for a dissident minority in the bargaining unit and not in the capacity as an individual citizen.*

A regular meeting of the Board of Education was scheduled for the evening of December 6, 1971. Prior to said meeting, Albert Holmquist and Ralph Reed, members of the teacher bargaining unit, decided to organize active opposition to the MTI fair-share proposal and formed a group called ECOLOGY to propound a minority position in regard thereto. (A.P. 79-90). Holmquist and Reed

proceeded to draft a letter opposing fair-share, had it commercially printed and mailed to all bargaining unit personnel. (A.P. 82, 135-136). They also applied for and obtained a post office box under the name ECOLOGY and signed the letter as "teacher co-chairmen." (A.P. 83, 135-136). The letter was mailed on November 14, 1971; approximately 200 replies were received, most of which were favorable to the ECOLOGY position. Holmquist and Reed then called a meeting of teachers actively opposed to fair-share and said meeting was held on December 2, 1971. At that meeting the group drafted a petition (A.P. 140) and a list of points of information. (A.P. 138-139). The group discussed logistics for circulating the documents drafted and developed a way to circulate them. (A.P. 85-86). The petition, points of information, and a cover letter were reproduced by a commercial printer and were then mailed to contacts for circulation in the schools. (A.P. 87). There were such contacts for all but one school. (A.P. 87). The documents were circulated in anticipation of a presentation being made of the petition and ECOLOGY's position at the Board of Education meeting scheduled for December 6, 1971.

Mr. Holmquist appeared at the Board meeting held on December 6, 1971, and he was permitted to speak to the Board. He prefaced his remarks to the Board by stating:

> "My name is Albert Holmquist. I reside at 5626 Crestwood Place. I am *another teacher*. I *represent* an informal committee of 72 teachers in 49 schools..."

Mr. Holmquist then advised the Board of the survey taken by ECOLOGY and read to the Board the text of a petition circulated by ECOLOGY among bargaining unit members. (A.P. 140). He advised the Board that 417 teachers from 31 schools had signed the petition as of the time of his address.

From the very outset of his statement, Mr. Holmquist addressed the Board not as a citizen addressing an elected public body, but as an employee bargaining agent representing a dissident minority in a bargaining unit. In such capacity, Holmquist was trying to achieve a collective bargaining goal, i.e. to persuade the Board, as employer, to hold fast or adopt a position in collective bargaining contrary to the position of the exclusive bargaining representative.

The characterization of Holmquist as a private citizen petitioning a public body in a public forum defies the facts. The elaborate and sophisticated efforts made to organize and enlist support of bargaining unit members for the position developed by ECOLOGY present a context within which Holmquist's explicit claim to a bargaining unit constituency can only justify him being viewed as a bargaining representative subject to the labor laws and policies of the State of Wisconsin. Having effectively established himself as a collective bargaining representative, albeit without

formal status, Holmquist cannot then head for cover under the Constitution in the guise of a citizen exercising his First Amendment rights.

If Holmquist had appeared before the Board and expressed his views regarding fair-share or any other topic in his capacity as a citizen rather than as a teacher and collective bargaining representative representing a dissident bargaining unit minority, he would certainly have been acting within his Constitutional rights and without litigious consequences. However, Holmquist's appearance was as the leader/representative of a dissident minority in the bargaining unit advocating a position on a mandatory subject of bargaining, which position was directly contrary to the position taken by the exclusive collective bargaining agent elected by the majority. Whatever his intent, Holmquist was in fact acting as a collective bargaining representative. As such, it matters not that his statement was made at a public meeting. Certainly, if his statement to the Board would have been impermissible in a private conference, it can be no more acceptable in public. To hold thus would be to say that prohibited labor practices are acceptable so long as they are committed in the guise of a public meeting.

In addition, Holmquist was urging the Board of Education to adopt the position of ECOLOGY in its capacity as an employer. Certainly, as a mandatory subject of bargaining, the fair-share issue could not be settled by the School Board's (management's) fiat or decree. Under law the fair-

share issue had to be disposed of through the collective bargaining process. Holmquist, as representative of ECOLOGY, was, therefore, urging upon the Board a position that it could only adopt and act on its capacity as employer in a collective bargaining setting. Holmquist did not seek to nor did he in fact address the Board as an individual citizen speaking to his elected officials. Instead, he took every measure to establish himself as a spokesman for, and representative of, a dissident bargaining unit minority and used such status to add clout to the position he advocated, on behalf of ECOLOGY, to the Board as an employer in the climax of negotiations. Such clout was certainly not available to Holmquist in his role as citizen.

In *Pickering v. The Board of Education* (1968), 391 U.S. 563, 88 Sup. Ct. 1731, a case cited by and relied on by the Appellant, the School Board dismissed a teacher who wrote a letter to a newspaper editor which (1) attacked the Board's handling of proposals to raise new school revenues and its allocation of resources between education and athletic programs and (2) charged the district superintendent with attempting to prevent teachers from criticizing a proposed bond issue. The United States Supreme Court held that Pickering's dismissal violated his First Amendment right of free speech.

The Court held teachers may not constitutionally be compelled to relinquish First Amendment rights they otherwise enjoy as citizens

to comment on matters of public concern in connection with the operation of the schools in which they work, *at least* where the comments are in no way directed towards any person with whom the teacher would normally be in contact in the course of his daily work and where no question of maintaining discipline by immediate superiors or harmony among co-workers is presented.

This Court specifically recognized the distinction between a teacher exercising rights as part of the general citizenry and a teacher acting in the capacity of an employee when it stated:

> "To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights, they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public school in which they work, it proceeds on a premise that has been unequivocally rejected in prior decisions of this Court. *At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.* The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, supra at 568. [Emphasis Added]

With all due respect, the Appellant misses the point this Court clearly made in *Pickering*, supra. (A.B.P. 22). The Court in *Pickering* held that a teacher is imbued with the same Constitutional rights as the rest of the citizenry. That does not mean that when a teacher steps out of the general citizen role and into the role of a labor organizer and bargaining agent and communciates with the Board as "employee"/"bargaining agent" talking to the "employer" that all labor laws and policies of the State go out the window.

Holmquist made every effort to gain status as a spokesman for members of the bargaining unit. By December 6, 1971 he had such status and used it to add impact to his presentation to the Board. Having established himself as a minority bargaining agent and acted as such, his conduct must be evaluated under the standards of labor relations law. Certainly the guise of "citizen" cannot be assumed retrospectively simply to gain the shelter of the umbrella of rights that our Constitution affords citizens. The Appellant seeks for would be dissidents the powers of collective bargaining without the corresponding restrictions of the labor laws. The powers and rights that attach in a given context must be based on an application of the law to the facts — not on an application of convenience to the facts. The best of all possible worlds is not a Constitutional right.

B. The Board of Education's role and obligations as a public employer cannot be circumvented under the guise of a public meeting.

The totality of the Board's conduct was such that it was likely to interfere with the rights of its bargaining unit employees to collectively bargain through MTI as the representative of their own choosing. First of all, the Board, through its agents, the principals, were privy to the organizational campaign of Holmquist. They allowed Holmquist to circulate anti-fair-share materials through teacher mailboxes and they saw these materials. (A. P. 120-121). Holmquist and Reed also asked for and secured permission from the building principals to circulate ECOLOGY's anti-fair-share petition to teachers in the school building and without restriction as concerns working or non-working areas. (A. P. 120). By the above conduct, the employer aided and abetted the dissident bargaining unit minority in its anti-fair-share program. In addition, the employer thereby gained actual knowledge that Holmquist was engaged in an organizational campaign aimed at scuttling the collective bargaining efforts of the majority bargaining representative. The Board was further informed of the activities of Holmquist and Reed when John Matthews, Executive Director of MTI, discussed said activities with Assistant Superintendent McGrew. (A.P. 38-39).

Moreover, Matthews and Mason discussed MTI's concern over Mr. Holmquist's intended appearance before the School Board with Board member Yelinek just prior to the Board meeting on December 6, 1971. They requested that Holmquist not be permitted to speak to the Board, showing Mr. Yelinek previous case law in support of MTI's position in regard to the propriety of Holmquist's appearance.

Finally, Mr. Holmquist's first several sentences:

> "I am another teacher. I represent an informal committee of 72 teachers in 49 schools..."

and his prefatory statement that he was going to talk about one of the "main items that will certainly be included in some form in the new package" unequivocably and explicitly revealed Holmquist's status as a minority representative and his intent to discuss a subject of collective bargaining. At the very least the Board had an obligation to stop Holmquist short at that point.

Upon Holmquist concluding his anti-fair-share proposal remarks, and knowing full well the content of his petition, since the same had just been read to them, the Board, nevertheless, indicated it would receive such petitions when they were available (A.P. 101).

Immediately after such public meeting, the Board went into executive session during which a discussion of the on-going negotiations took place. During such discussion, the Board resolved to

grant arbitration of teacher non-renewals and dismissals and to again reject MTI's fair-share proposal.

Hence, after hearing from the minority representative, the Board changed its bargaining position. A strong inference arises under such circumstances that such change occurred because the Board was fully influenced by Holmquist's minority presentation.

The facts are not in dispute. The Board's actions in this regard were likely to have only one effect — that of fully frustrating MTI in its bargaining position as well as undermining it in its role as the majority representative of a majority of the employees. Such conduct clearly interfered with the rights of bargaining unit teachers to be represented by MTI as the bargaining representative of their choice.

The employer's actions, as has been pointed out, were not merely passive interference with the right of the teachers of the bargaining unit to be represented by MTI. The toleration the employer showed toward the circulation of the petitions together with its apparent receptiveness to the presentation of Holmquist, aided and abetted Holmquist's anti-union activity. Such an interpretation of the School Board's responsibility is fully supported by precedent established pursuant to the Labor-Management Relations Act.

The Board (employer) was aware of the petition being circulated and it permitted the use of teacher

mailboxes to support the activities of the dissident minority. Finally, and most importantly, the Board listened to Holmquist's anti-MTI position and indicated a willingness to receive the petition when it became available. The Board shares responsibility for Holmquist's incursion on the legitimate collective bargaining processes relegated to the exclusive majority bargaining representative. The federal case law is clear on this point. See *Bishop and Malco, Inc.* (1966) 159 NLRB 1159, 62 LRRM 1498. *Bryan Bros. Packing Corp.* (1968) 171 NLRB No. 39, 63 LRRM 1008. *Bell Bakeries* (1952) 97 NLRB 1423, 29 LRRM 1254; and *Cherokee Sportswear, Inc.* (1969) 172 NLRB No. 40, 72 LRRM 1059.

The Board's conduct involves more than its permitting Holmquist to speak to it on fair-share, that is, more than speech activity. It involves conduct, i.e. activity which could only have for its purpose the frustration of the rights of the majority. In addition, with fair-share being a mandatory subject of bargaining, and in fact a subject of bargaining, any conduct related to the disposition of that issue would have to occur through the collective bargaining process. Participation in the collective bargaining process is governed by the labor laws of the State of Wisconsin. The Wisconsin Municipal Employment Relations Act is directed at setting the rules and shaping the guidelines for labor relations in the public sector. The School Board is regulated by the Wisconsin Municipal Employment Relations Act in

its capacity as a public employer and cannot avert such regulation merely by shifting some component(s) of its collective bargaining activities to a public forum.

C. Fair-share is a mandatory subject of bargaining that was in fact a subject of intense bargaining throughout 1971.

Municipal employees in Wisconsin have a statutory "right to collectively bargain through representatives of their own choosing." Section 111.70 (2), Wis. Stats. provides in relevant part as follows:

> "Municipal employes shall have the right of self organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection and such employes shall have the right to refrain from any and all such activities...."

A Fair-Share Agreement is defined by Section 111.70 (1) (h) Wis. Stats. as:

> '.... an agreement between a municipal employer and a labor organization under which all or any of the employes in the collective bargaining unit are required to pay their proportionate share of the cost of the collective bargaining process and contract administration measured by the amount of dues uniformly required of all members. Such an agreement shall contain a provision requiring the employer to deduct the amount of dues as certified by the labor organization from the earnings of the employes affected by said agreement and to pay the amount so deducted to the labor organization."

Such an agreement requires all, or any of the employees in a collective bargaining unit, whether members of the majority bargaining agent or not, to pay their proportionate share of the collective bargaining process and contract administration. Fair-share agreements are a type of union security arrangement and as such are a mandatory subject of collective bargaining.

> "Union security is properly a 'condition of employment', within the meaning of Sec. 9 (c) of the National Labor Relations Act and hence is within the statutory area of collective bargaining." *NLRB v. Andrew Jergens Co.* (CA 9 1949), 24:2096, enforcing 21, 1192 [24:2561] cert. denied 33 LRRM 2133. Also see *Alberto Culver Co.* 136 NLRB 1432, 50 LRRM 1026; *MFA Milling Co.* (1968), 170 NLRB No. 111, 68 LRRM 1077.

Madison Teachers Incorporated presented a fair-share proposal among its original proposals at the commencement of collective bargaining negotiations in January, 1971 for a successor collective bargaining agreement. Agreement between the parties relative to a successor agreement was reached on December 14, 1971. During the entire period of negotiations commencing on January 25, 1971 and ending on

December 14, 1971, fair-share was a subject under discussion at the bargaining table. As a matter of fact, by November 1971, negotiations had reached a stage of apparent impasse and fair-share remained as one of two major unresolved issues, along with binding arbitration of teacher non-renewals and dismissals. At about the time formal negotiations seemed at an impasse, Paul Olson, chief negotiator for the Board, during a meeting with Mr. Speerschneider, chief negotiator for Madison Teachers Incorporated, indicated that he could see no way in which the Board would grant binding arbitration for non-renewals and dismissals, but that there was a distinct possibility that the Board would concede fair-share. This off the record movement presented a possible channel for resolving the impasse. It is this critical and delicate stage of negotiations that forms the backdrop of the events that beckon the Court's scrutiny.

II. The Concept Of Exclusivity Lies At The Core Of The Majority Rule Principle In Labor-Management Relations And Has Been Endorsed By This Court As Well As The Laws Of The State Of Wisconsin As An Essential Component Of Effective Collective Bargaining.

The Appellant makes no direct issue of the majority rule principle or the exclusivity principal

in terms of their importance to labor-management relations or in terms of their constitutional validity (see Brief page 22 ff.). The Appellant, however, does engage in a collateral attack on these principles by virtue of the way in which the Appellant would have this Court apply constitutional protections guaranteed to individuals as citizens to individuals acting as collective bargaining representatives for a dissident bargaining unit minority. By ignoring the totality of the circumstances that lead up to and surround Mr. Holmquist's address and the Board's conduct and harping on misplaced constitutional issues, the Appellant is in fact attacking the viability of exclusivity and majority rule in labor-management relations with the consequent threat to the efficacy of collective bargaining itself.

A. Wisconsin law endorses the fundamental principles of majority rule and exclusivity.

The Wisconsin Supreme Court in *Board of School Directors v. WERC*, (1969), 42 Wis. (2d) 637; 168 N.W. (2d) 92 states:

> "Sec. 111.70 does not now specifically state, nor has it ever stated, that the majority union representative is the exclusive bargaining representative for all the employees. Yet, all the parties to this appeal, including the minority union, concede that it should be so interpreted

or there would be little point in having an election to determine the majority union representative."

* * * *

"It should be noted, in passing, that while this court has never specifically decided whether sec. 111.70 provides for exclusive representation, by implication the court has approved such a construction. In *Milwaukee County Dist. Council, etc. v. Wis. E.R. Bd.* (1964), 23 Wis. 2d 303, 304, 127 N.W. 2d 59, 60, 11 A.L.R. 3d 810 this court entertained an action to review the WERC's certification of the Milwaukee Garbage Collection Laborers Independent Local Union as the

"* * * *exclusive* collective bargaining representative for city employees in a particular bargaining unit ***" (Emphasis supplied.)

"The WERC's certification was approved without any comment concerning its exclusiveness. Again in *Joint School Dist. No. 8, City of Madison v. Wis. E.R. Board* (1967), 37 Wis. 2d 483, 486, 155 N.W. 2d 78, 79, this court referred to Madison Teachers, Inc., as

"*** the exclusive collective bargaining representative of the nonsupervisory teachers employed by the school ***."

"No mention was made of the exclusive nature of the representation. While it must be conceded that exclusivity was not an issue in the cases cited above, the failure to object to the WERC's construction of sec. 111.70, Stats., amounts to a tacit approval.

* * * *

"The WERC has reasonably concluded that sec. 111.70, Stats., provides for the certificate of the majority union as the exclusive bargainer. We approve of that construction."

On the basis that negotiating on behalf of the bargaining unit is an exclusive function of the exclusive bargaining agent, the Court held that a minority union cannot negotiate with the employer. It was, therefore, held that a School Board could properly deny the representative of a minority union the right to speak at a public meeting of such Board on negotiable matters and that such denial did not infringe upon the right of free speech as guaranteed by the Wisconsin Constitution. The key question in *Board of School Directors v. WERC*, supra, is whether a statement at a public meeting by a minority union representative on a question subject to collective bargaining constitutes negotiating. The Wisconsin Supreme Court answered that question affirmatively.

The Court held that a minority union has no right to negotiate with the employer, and that if the employer negotiated with the minority union, that in itself would be a prohibited practice. In a later decision the Court commented on the meaning of its *Board of School Directors* case:

"The essence of the *Board of School Directors* case was merely that, if a municipality sees fit to bargain, it must do so with the certified representative of the employees and cannot negotiate with a minority union." *La Crosse*

County Institution Employees Local 227 v. W.E.R.C. (1971), 52 Wis. (2d) 295; 190 N.W. (2d) 204.

A municipal employer is bound to deal exclusively with the majority representatives of its employees. A municipality is prohibited from negotiating with a minority union or with its bargaining unit employees individually or in groups, whether such employees are organized or not. Such violation of the exclusivity principle is destructive to the collective bargaining process.

B. Federal law endorses the fundamental principles of majority rule and exclusivity.

The right of free speech is not absolute. "Freedom of Speech" and "Freedom of Assembly" are susceptible to restriction, but only to prevent grave and immediate danger to interests which the State may legally protect. *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624; 63 S.Ct. 1178.

Pickering v. Board of Education, supra, certainly recognizes:

> "That the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." at P. 568.

Accordingly, a fireman could be disciplined for publicly and falsely criticizing his superiors, although a citizen could not be punished for the

same speech. See *Fisher v. Walker* (10th Cir. 1972), 464 F. 2d 1147.

Not only is the government's power respecting the pure speech of its employees great, but also the government may totally suppress employee speech-conduct. Thus, a total ban could be placed on political management and political campaigning by federal employees, *U.S. Civil Service Com'n v. Letter Carriers* (1973), 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed. 2d 796, and state employees, *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830. Indeed, a city could constitutionally suspend a police officer for writing a letter to fellow officers urging support for a political candidate *Paulos v. Breier* (E.D. Wis. 1974), 371 F. Supp. 523.

In the labor relations area, the prohibition against employee negotiations other than through the majority representative serves two important governmental interests. First, the principle of majority exclusivity aids the government employee. It has long been recognized that collective unity advances the individual's interest notwithstanding he may sometimes disagree with the will of the majority. See *NLRB v. Allis-Chalmers Mfg. Co.* (1967), 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L.Ed. 2d 1123.

Second, the majority principle brings stability to the employment relationship. "There cannot be two or more basic agreements applicable to workers in a given unit." H.R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. at 20. See *Western*

Addition Community Org. v. NLRB (Ca DC 1973), 485 F. 2d 917, 925.

To require teachers to speak to their school board employer on negotiable matters through their majority bargaining representative is not to single them out for special treatment as the Appellant would indicate. Employees in the private sector of our economy are limited in the same way. An employer in the private sector of the economy is likewise bound to deal exclusively with the majority bargaining agent. Therefore, when negotiations have been requested or are pending, an employer in the private sector may be found guilty of bad faith bargaining if it negotiates directly with its employees. *Medo Photo Supply Corp. v. NLRB* (1944), 321 U.S. 678, 64 S.Ct. 930, 14 LRRM 581.

Accurately stated, the Wisconsin Supreme Court merely held that under the Wisconsin Municipal Employment Relations Act, certified majority bargaining agents have *exclusive* negotiating rights with the employer. Holmquist or any other public employee can speak and petition to their heart's content so long as they do not intrude upon the collective bargaining or negotiating prerogatives of the exclusive majority bargaining agent. The Court properly declined to reverse the finding of fact that Holmquist's conduct constituted bargaining. The issue is the exclusivity of the collective bargaining function — a policy that has been subjected to the scrutiny of this Court and found to be constitutionally permissible. See *Medo Photo Supply Corp. v. NLRB*,

supra, and the very recent case of the *Emporium Capwell co. v. Western Addition Community Organization* (1975), 420 US 50. Certainly the same labor relations policies that are endorsed on the federal level cannot be deemed constitutionally impermissable when adopted by the states. The Wisconsin Supreme Court stated in its decision herein: "The principle of exclusivity, by definition, forbids certain individuals from speaking certain things in certain contexts." (A.P. 189). This narrow restriction is constitutionally permissible. Such a policy has been endorsed by the federal government and the state of Wisconsin... "to avoid the dangers attendant upon relative chaos in labor-management relations." (A.P. 189).

We respectfully direct the Court's attention to *Emporium Capwell Co. v. Western Addition Community Organization*, supra.

Emporium Capwell, supra, is important because it unequivocably expresses this Court's "long and consistent adherence to the principle of exclusive representation tempered by the safeguards for the protection of minority interests." (at p. 65)

In *Emporium Capwell*, supra, this Court declined to erode the principle of exclusivity when a minority exercised, what under most circumstances are, First Amendment rights and picketed to demand that an employer bargain directly with the minority in regard to alleged racial discrimination problems in the employer's enterprise. What this Court said in that opinion is worthy of extensive quotation:

"Section 7 affirmatively guarantees employees the most basic right of industrial self-determination, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from these activities. These are, for the most part, collective rights, rights to act in concert with one's fellow employees; they are protected not for their own sake but as an instrument of the national labor policy of minimizing industrial strife "by encouraging the practice and procedure of collective bargaining." 29 U.S. C. § 151.

"Central to the policy of fostering collective bargaining, where the employees elect that course, is the principle of majority rule. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the majority of a unit chooses union representation, the NLRA permits them to bargain with their employer to make union membership a condition of employment, thereby imposing their choice upon the minority. 29 U.S.C. §§ 157, 158 (a) (3). *In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.* [Emphasis Added] *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *J.I. Case Co. v. NLRB*, 3[illegible]

U.S. 332, 338-339 (1944); H.R. Rep. No. 972, 74th Cong., 1st Sess., 18, II Leg. Hist. of the NLRA 2974 (1935). As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)." *Emporium Capwell Co. v. Community Org.*, supra, pp. 61-62.

It should be noted that neither the fact that a First Amendment activity was involved nor the fact that the picketing wa[illegible] for the purpose of combating racial discrimination, an area of prohibited conduct ranking high in our national consciousness and of particular constitutional and statutory concern, were permitted to divert this Court's attention from the central labor relations issues that were the essence of the case and the labor relations considerations that compelled the result. In addition, the Court quoted, with approval, its previous decision n *NLRB v. Allis-Chalmers Mfg. Co.*, supra, which interpreted the NLRA § 8 (b) (1) (A) with an emphasis on national labor policy:

> "*National labor policy* has been built on the premises that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. 'Congress has seen fit to clothe the bargaining representative with

powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents....' *Steel v. Louisville & N.R. Co., 323 U.S. 192.* Thus *only* the union may contract the employee's terms and conditions of employment, and provisions for processing his grievances; the union may even bargain away his right to strike during the contract term..." 388 U.S., at 180 (footnotes omitted, Emphasis Added). *Emporium Capwell Co. v. Community Org.*, supra, at pp. 63-64.

Finally, this Court pointed out that the NLRA (it has already been noted that Wisconsin labor law is modeled after the NLRA) provides procedures for minorities to exercise or secure their rights. Minority groups have the opportunity under the law to work towards majority status or towards influencing the majority or other employees on substantive matters. Such substantive goals, however, "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA". (This would be applicable to Wisconsin's Municipal Employment Relations Act also).

In essence, Wisconsin has established a statutory framework for public sector labor-management relations similar to the NLRA. It provides for majority rule and exclusivity of bargaining agents. It also provides for protections and rights for minorities. There is nothing to stop a minority from exercising its rights to achieve a substantive aim or even to achieve majority status — so long as these are done within the framework

of the sound labor policies embodied in the statutes. Wisconsin has experienced a progressive and healthy public employment relations atmosphere by following the pattern set on the federal level. This is a monumental achievement that we should not be lulled into destroying by an ill-considered application of constitutional restrictions to the facts herein.

This Court has never found the First and Fourteenth Amendments to be a bar to majority rule and exclusivity in the collective bargaining scheme as it has evolved. No justification has been advanced for it to do so now.

C. Denying a representative of a minority of the bargaining unit employees the right to appear at a public meeting of the Board of Education and to negotiate with the Board on mandatory subjects of bargaining does not infringe upon the right of freedom of expression or the right to petition one's government, as guaranteed by the Wisconsin and United States Constitution.

The Appellant argues that Holmquist's statement is protected by the Constitutional right to petition and freedom of speech. The Appellant takes such position in the face of the clear endorsement of the principles of majority rule and exclusivity of bargaining agents by this Court and

the law at both the state and federal level. The crux of the issue, then, is whether the conduct involved herein is violative of the principle of exclusivity, i.e., whether it constitutes negotiating or bargaining. While the Appellant argues that the "majority rule" principle was never intended to prevent communication between the employer and his employees (Brief P. 26), that does not take into account that the very essence of bargaining is communication and persuasion. While the Appellant argues that the "majority rule" principle was not intended to insulate the "exclusive representative" from criticism, that does not take into account that Holmquist's primary purpose was not to criticize, but rather to achieve a collective bargaining goal by intrusion into the collective bargaining process. Holmquist specifically refrained from criticizing. The real issue here is whether it was unconstitutional for the Wisconsin Supreme Court to find that under the facts of this case, Holmquist's presentation to the Board constituted bargaining or negotiating.

The Appellant totally confuses minority and individual rights associated with "industrial democracy" with the exclusivity principle associated with collective bargaining. Industrial democracy provides for majority rule through the free selection by employees as to who, if anyone, will represent them. Once selected as the majority bargaining representative, the representative is the exclusive collective bargaining representative until such time as such representative is properly removed.

Appellant's citation of *Magnavox v. NLRB* (1974), 415 U.S. 322 as relevant to the case at bar is symptomatic of the utter confusion that permeates Appellant's argument. *Magnavox v. NLRB*, supra., involved an organizational type of communication among employees. The communication flow was from employee to employee and its restriction would affect the ability of employees to effectively exercise their rights to organize under the law. Communication between dissident minority and the employer as regards matters subject to collective bargaining stands on a different plane because it can totally undermine the exclusivity principle in collective bargaining so as to cripple the majority rule principle as well as the effectiveness of collective bargaining itself. Communication between employees is not the same as communication between dissident employees and the employer relative to matters subject to collective bargaining.

The Appellant agrees that "only Madison Teachers Incorporated, the exclusive representative of the teachers of the district, possesses the right to bargain with the Board of Education." (Appellant Brief P. 38) Similarly, MTI agrees that "all teachers employed by the Board of Education, Joint School District No. 8, possess the rights to speak freely and to petition possessed by other citizens." (Appellant Brief P. 38). The question which begs resolution, is one of fact — does the conduct complained of herein constitute an exercise of the rights of free speech and the

right of petition by a citizen before his elected officials, or does it constitute collective bargaining and/or negotiating by a collective bargaining representative for a dissident bargaining unit minority with a municipal employer? It is not a question of semantics. It is a question of realizing the fact that public bodies and individuals can occupy more than one role in our society and that conduct appropriate in one role may be inappropriate in another. If Holmquist or someone in like circumstances, wished to address the School Board as a citizen, he should have done so. Instead, he chose to organize a minority "bargaining unit" for the purpose of asserting a minority position in the collective bargaining process. The fact that he chose to organize *only* bargaining unit members demonstrates that the fair-share issue was viewed and treated as a bargaining unit issue rather than as a more generalized civic issue. Holmquist was an intruder in the collective bargaining process, engaged in "illegal procedure," rather than a citizen exercising his constitutional rights.

The Appellant argues that consistent with the National Labor Relations Act as well as Section 111.70, Wis. Stats.,

> "... public employers may listen to employees and receive information from their employees on all matters as long as the public employer refrains from evidencing an express or implied desire to deal directly with its employees and refrains from action soliciting or inducing employees to deal directly with him,..." (Brief P. 53)

Appellant cites five federal cases in support of its proposition above stated, i.e., that an employer can lawfully deal directly with his employees relative to negotiable subjects. We respectfully submit that Appellant's position is without merit and is not supported by federal cases cited by Appellant.

In three of such cases, specifically *White Sulphur Springs Company*, supra, *Coast Radio Broadcasting Corporation*, (1965), 151 NLRB 117, 58 LRRM 1574; and *American Printing Company* (1968), 173 NLRB No. 17, 69 LRRM 1238, the involved employer heard his bargaining unit employees on negotiable matters without the presence of the union or its authorized business representative. In each case the employer dealt with *all* the bargaining unit employees, and not with a dissident minority of such bargaining unit employees, but without the presence of a representative of the union. In each case, the position advanced by the involved employees was the majority position relative to such negotiable matters rather than a minority position. Further, and most importantly, in each case, there was a finding that the involved employer had not dealt directly with the bargaining unit employees without the presence of their union.

Tabasco Prestressed Concree Company, 177 NLRB (1969) 101, 71 LRRM 1565 likewise fully supports the rule that an employer cannot deal directly with individual employees in disregard of the union, rather than the premise stated by the

Appellant herein. In *Tabasco*, supra, the NLRB found the employer's conduct in explaining a proposed insurance program to two bargaining unit employees was not sufficient to violate the rule. However, when the employer went further and dealt directly with two bargaining unit employees in an attempt to persuade them to go to work for a company to which the employer had subcontracted its truck work, the NLRB quickly found a violation.

In Lawn Boy Division Outboard Marine Corporation, (1963), 143 NLRB 535, 53 LRRM 1342, upon hearing rumors that a petition was being circulated among its employees to accept management's bargaining proposal, the employer forbade the circulation of such petition during working hours. Later the employer received such petition, a fact it merely acknowledged, nothing more. The employer did not encouarge, aide or abet the employees in the circulating of their petition and the NLRB found such evidence was insufficient to support a finding that the employer violated the LMRA. Such case again fully supports the rule that an employer must deal exclusively with the majority bargaining representative. An employer cannot deal directly with a minority of its bargaining unit employees as concerns negotiable matters and the cases cited by the Appellant provide no support for a different conclusion.

To require the Board of Education to deny to the representative of the minority of its bargaining

unit employees the right to negotiate with the Board at a public meeting of the Board on negotiable matters does not infringe upon or abridge constitutional guarantees of freedom of speech.

III. The Public Policy Considerations Which Have Resulted In The Majority Rule Principle And The Exclusivity Doctrine In Labor-Management Relations Law Is At Least As Sound For The Public Sector As It Is For The Private Sector.

It is the public policy of Wisconsin to encourage the voluntary settlement of labor disputes arising in municipal employment through the procedures of collective bargaining (sec. 111.70 (6) Wis. Stats.) and accordingly, it is in the public interest that municipal employees be given an opportunity to collectively bargain with the municipal employer through a representative of their choice. The voluntary settlement of municipal labor disputes through the procedures of collective bargaining is an interest that the State may lawfully protect and in doing so it may legitimately restrict the right of dissident employees and minority bargaining representatives to speak under circumstances and as to subjects that constitute bargaining or negotiating.

The State has substantial reasons, including the voluntary settlement of labor disputes arising

in municipal employment through the procedures of collective bargaining, for establishing the enabling legislation which permits teachers to organize and to bargain collectively through the majority representative of their choice. Hence, even if Holmquist's right to negotiate freely, as representative of a dissident minority within the bargaining unit, to the employer on a mandatory subject of bargaining, was seen as being curtailed, the substantiality of the reasons advanced for doing so are sufficiently great so that such regulation is justified.

To allow the representative of a minority of the bargaining unit employees, whether formally or informally conceived, to negotiate with the School Board at a public meeting of the Board on a mandatory subject of bargaining, for the purpose of influencing the decision of the School Board on that subject is to allow conduct which can only defeat the legislative purpose of the Municipal Employment Relations Act. Wisconsin's Municipal Employment Relations Act is patterned after the National Labor Relations Act, as Appellant's brief so aptly points out in great detail. (Appellant Brief p. 27). On the other hand, to deny the minority representative such a right is only to eliminate possible infringement upon the State's legitimate interest of preserving labor peace. If minority representatives, like Holmquist, are permitted to influence the School Board employer in its decision making role on bargainable matters, the entire concept of exclusive representation is lost.

The right of the minority to speak freely on negotiable matters must be weighed against the equally important right of the majority to bargain collectively with their employer through the organization of their choice. The right of the minority to speak freely on negotiable matters must be weighed then against the majority's right to protection against unlawful conduct which is likely to result in the destruction of that majority representative as a viable and effective bargaining agent.

Freedom of Speech cannot be used as a cover for unlawful activities. Section 111.70 (3) (a) 1 Stats. prohibits an employer from interfering with the rights of his employees to collectively bargain and Section 111.70 (3) (a) 4 Stats. requires an employer to collectively bargain only with such majority representative. Freedom of Speech cannot be used as a cover to indulge in conduct which "interferes" or conduct which amounts to "a refusal to bargain." To allow the Board and Holmquist to engage in such unlawful activity under the guise of free speech would be to erode the very base of the exclusive bargaining privilege the State Legislature has seen fit to establish.

This Court is well aware of the utter threat to public health, safety and convenience occassioned by labor turmoil. It is the bedrock of experience from which our orderly processes for conducting labor management relations have emerged. The deep concern shown over the minimization of strife in the private sector is at least as appropriate to

the public sector. The practice and procedures of collective bargaining is the best method available to date to foster the peaceful settlement of labor disputes. To say that the public sector has less of a need than the private sector for preserving the integrity and viability of the collective bargaining process is to take an untenable position that disregards the realities of public sector labor relations.

Absolutely no public purpose is served by the dilution and weakening of the majority rule and exclusivity doctrines in the public sector. The encouragement of minority intrusion in the collective bargaining process only serves to make collective bargaining weaker and less effective than what is in the public interest. Everyone is well served by the majority rule and exclusivity doctrines. Employees get to organize, or not organize freely based on the wishes of the majority. Responsible union leadership is encouraged and fostered by a level of stability in the participation in the collective bargaining process. The public employer knows who the legitimate bargaining representative is and can deal more effectively with one representative than with competing minorities. The purpose of public schools is education, not free-for-all labor turmoil

It is crucial that the public schools as well as other public employers be able to carry out their public purposes without turning into arenas for protracted inter-union battles.

Once it is decided by the majority who shall govern the bargaining unit, the efficacy and legitimacy of the majority bargaining

representative should not be undermined and its efforts sabotaged by dissident minorities intruding upon collective bargaining functions. This does not mean that the exclusive bargaining representative, once elected, should be entrenched by law; it means only that said exclusive bargaining representative should retain the status of the official exclusive representative for collective bargaining until such time as it is replaced by the bargaining unit through procedures provided under the law.

The policy of divide and conquer can only lead to labor turmoil and the destruction of the collective bargaining structure. The stability of labor relations and the peaceful settlement of labor disputes is at least as crucial an interest in the public sector as we have already recognized it to be in the private sector.

CONCLUSION

This brief has dealt heavily with the facts because this case must be brought back to the facts. MTI does not seek to tamper with any of the high ideals which the Constitution was intended to realize. The fundamental freedoms are a resource to us all. However, the rights of free speech and freedom to petition simply are not threatened by the relief sought by MTI in application to the facts herein.

Denying a representative of a dissident minority of the bargaining unit employees the right to appear at a public meeting of the Board of Education and to negotiate with the Board on

mandatory subjects of bargaining does not unlawfully infringe upon the right of freedom of expression or the right to petition one's government as guaranteed by the Wisconsin and United States Constitutions.

Further, in the instant matter, the Board's conduct involved more than merely permitting Holmquist to speak to it on a mandatory subject of bargaining. It involved conduct which, in its totality, was such that it was likely to interfere with the right of its employees to bargain through MTI as the representative of their choosing. Such conduct is violative of Section 111.70 (3) 1 Wis. Stats. The law is clear. Where a majority representative has been chosen by its employees, it is incumbent upon the employer to bargain with that representative and no other.

The Appellant's position that a municipal employer is acting in conformity with its responsibilities under the NLRA and MERA "if he listens to a minority of his bargaining unit employees regarding negotiable matters, receives information, thoughts or sentiments of bargaining unit employees concerning negotiable matters or discusses negotiable matters with bargaining unit employees without the certified bargaining representative in the absence of an express or implied desire by the employer to deal directly with the employees or affirmative action soliciting or inducing employees to deal directly with him" is without merit and is contrary to well settled law. The cases cited by the Appellant simply do not support any such premise.

If the representative of the minority is permitted to influence the decision of the School Board by his argument, then he is truly "negotiating". There need be no two-sided conversation. A presentation by one party aimed at pursuading the other party to take a given position related to a matter subject to collective bargaining is in fact a component of the collective bargaining process. A position taken by one side in collective bargaining, can amount to a prohibited practice without any response from the other. It does not take two to commit a prohibited practice.

The Board's statutory duty is to deal with the majority representative in good faith and with the intention of reaching an agreement. The Board's conduct in dealing with Holmquist was entirely inconsistent with such duty.

The denial to a minority of the right to negotiate with their employer, which is speech-conduct, serves the interests of the employes and the government and does not offend free speech rights. Such a denial, in fact, is indispensable to

maintaining the integrity and viability of the majority rule and exclusivity principles, the heart and soul of the collective bargaining process. It serves the highest public interest. Madison Teachers Incorporated respectfully requests that the Judgment of the Wisconsin Supreme Court be affirmed.

Respectfully submitted,

Robert C. Kelly

William Haus

KELLY and HAUS
302 East Washington Avenue
Madison, Wisconsin 53703

Attorneys for Appellees,
MADISON TEACHERS INCORPORATED